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Nos. 00-1417 and 00-8512

In the Supreme Court of the United States

GARRICK BECK AND JOAN KALB, PETITIONERS

v.

UNITED STATES OF AMERICA

STEPHEN SEDLACKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a regulation prohibiting the use or occupancy of National Forest System land without a required special use authorization, 36 C.F.R. 261.10(k), can be applied to individuals who had leadership roles in a noncommercial gathering that required a special use authorization under 36 C.F.R. 251.50, 251.51, because 75 or more people were involved in the activity.

2. Whether the Forest Service regulations requiring a special use authorization for noncommercial group uses are unconstitutionally vague or overbroad.

3. Whether the Forest Service regulations constitute a valid time, place, and manner restriction, or impose a prior restraint.

4. Whether the Forest Service regulations vest officials with unbridled discretion to impose terms and conditions on a special use authorization to protect the public interest and are, therefore, unconstitutional on their face.

5. Whether provisions for judicial review in the Forest Service regulations are constitutionally adequate.

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OPINIONS BELOW

The opinion of the court of appeals (00-1417 Pet. App. 1a-19a) is reported at 234 F.3d 827. The opinion of the district court (00-1417 Pet. App. 20a-41a) is reported at 86 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2000. The petition for a writ of certiorari in No. 00-8512 was filed on February 12, 2001. The

petition for a writ of certiorari in No. 00-1417 was filed on March 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were charged by information with a misdemeanor for violation of 36 C.F.R. 261.10(k), which prohibits the use of National Forest System land without a special use authorization when such authorization is required, as it is for use by a group of 75 or more persons. See 36 C.F.R. 251.50(a) and (c)(3), 251.51. Petitioners contended that the regulations did not apply to them as individuals and were unconstitutional. After a two-day bench trial, the district court found each petitioner guilty as charged. 00-1417 Pet. App. 21a. The court imposed a three-month term of imprisonment and a $10 special assessment on each petitioner and, in addition, a $500 fine on petitioners Beck and Kalb. *Id.* at 4a; 00-1417 Pet. 3; 00-8512 Pet. 1. The district court stayed the imposition of sentence pending appeal. 00-1417 Pet. App. 4a. The court of appeals affirmed. *Id.* at 1a-19a.

1. Petitioners are members of the Rainbow Family, which is "an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express and demonstrate their ideas and views." 00-1417 Pet. App. 3a n.1 (citation omitted). The members have gathered annually "on or around July 4 since 1972." *Ibid.* There are more than 20,000 participants at such gatherings, which "last for a month or more." *Ibid.* In addition, members attend smaller regional gatherings "through-

out the year in National Forests across the country." *Ibid.*

2. a. Federal regulations prohibit the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. 261.10(k). Pursuant to 36 C.F.R. 261.1b, a violation of Section 261.10(k) "shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both." See also 16 U.S.C. 551 (authorizing same sanctions).

b. Authorization for a "special use" of National Forest System lands or resources is required when the proposed use is noncommercial and involves a group of 75 or more people. See 36 C.F.R. 251.50, 251.51. A "special use" is defined as a use other than those specified in certain regulations governing the grazing of livestock and the disposal of timber and minerals. *Ibid.* Noncommercial activities are generally exempted from the special use authorization requirement. 36 C.F.R. 251.50(c). Noncommercial activities that constitute "group uses," however, are not exempt. 36 C.F.R. 251.50(c)(3). "Group use" is defined as "an activity * * * that involves a group of 75 or more people, either as participants or spectators." 36 C.F.R. 251.51. Thus, noncommercial group uses require a special use authorization.

Federal regulations presume that a special use authorization will be granted for a noncommercial group use. See 36 C.F.R. 251.54(h)(1) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii));[1] 60 Fed. Reg. 45,260,

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[1] Some of the relevant regulatory provisions were recodified in November 1998 as part of a general streamlining of the application process for special use authorizations. See 63 Fed. Reg. 65,950-65,969. Because the courts and the parties continue to refer to the

45,278 (1995). The regulations provide that the Forest Service "shall" grant an application for a special use authorization by a noncommercial group if the requested use meets specified content-neutral criteria concerning, *inter alia*, forest land management, environmental protection, and public health and safety. 36 C.F.R. 251.54(h)(1) (1998). The final criterion requires that "[a] person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant." 36 C.F.R. 251.54(h)(1)(viii) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii)(H)).

The application for a special use authorization for a noncommercial group use "is a simple one-page document which essentially requires the applicant to supply information concerning the location and description of the National Forest System land upon which the activity will take place, the facilities that the applicant seeks to use, the estimated number of participants and spectators, the starting and ending times and dates for the proposed activity, and the name of an adult who will sign a special use authorization on behalf of the applicant." 00-1417 Pet. App. 4a; see 00-8512 Pet. App. E2-E3; 36 C.F.R. 251.54(e)(1) and (2)(i)(A)-(E) (1998) (recodified at 36 C.F.R. 251.54(d)(1) and (2)(i)(A)-(E)).

Federal regulations provide that "[a]ll applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses unless the applications are denied within 48 hours of

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1998 codification (see, *e.g.*, 00-1417 Pet. App. 3a n.2; 00-1417 Pet. 3 n.3), however, we also cite to the 1998 codification where the current codification is different. For the Court's ease of reference, the first time we cite the 1998 version of a provision, we also include a citation to where the section is found in the current codification.

receipt." 36 C.F.R. 251.54(f)(5) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(i)). Denial of any application must be provided in writing to the applicant and must provide the reasons for the denial. 36 C.F.R. 251.54(h)(2) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(iii)). If a Forest Service officer denies an application for failure to meet the regulatory criteria, but an alternative time, place, or manner would enable the proposed group use to meet the criteria, the officer must offer that alternative to the applicant. *Ibid.* The denial of a special use authorization for a noncommercial group use under these provisions constitutes final agency action that is subject to judicial review. *Ibid.*[2]

Revocation or suspension of a special use authorization for a noncommercial group is allowed only on certain listed grounds. 36 C.F.R. 251.60(a)(1)(i)(A)-(D). A revocation or suspension constitutes final agency action and is immediately subject to judicial review. 36 C.F.R. 251.60(a)(1)(ii).

Each special use authorization must contain listed terms and conditions, including ones designed to secure compliance with public health and safety laws and to protect the environment. 36 C.F.R. 251.56(a)(1)(i)-(iv)

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[2] If a noncommercial group use application is denied based solely on the criterion relating to the impact that the proposed activity would have on certain identified sensitive resources or lands (see 36 C.F.R. 251.54(h)(1)(iii) (1998) (recodified at 36 C.F.R. 251.54(g)(3)(ii)(D)), and the alternatives offered are unacceptable to the applicant, the Forest Service must offer to complete the required environmental and other analyses for the requested site. 36 C.F.R. 251.54(h)(2) (1998). A decision to grant or deny the application for which such an environmental assessment is prepared shall be subject to administrative notice and appeal procedures and shall be made within 48 hours after the decision becomes final under that appeal process. *Ibid.*

(1998) (recodified at 36 C.F.R. 251.56(a)(1)(i)(A)-(D)). The Forest Service is authorized to impose additional terms and conditions deemed necessary to protect, *inter alia*, lives, property, federal property and economic interests, and otherwise to "protect the public interest." 36 C.F.R. 251.56(a)(2)(i)-(vii) (1998) (recodified at 36 C.F.R. 251.56(a)(1)(ii)(A)-(G)).[3]

3. a. "For a period of weeks during the summer of 1999 [late June and early July], some 20,000 people attended a Rainbow Family gathering in Pennsylvania's Allegheny National Forest." 00-1417 Pet. App. 3a (footnote omitted), 22a. Each of the three petitioners "was present at that gathering and was identified by a Forest Service criminal investigator as having had some role in organizing or administering the event." *Id.* at 3a.

The Rainbow Family failed to obtain the required special use authorization for a noncommercial group use. Each of the petitioners was advised by a Forest Service employee of the need for the Rainbow Family to apply for a special use permit, was asked to sign a special use authorization, and refused to do so. 00-1417 Pet. App. 4a, 31a. Each petitioner was issued a citation charging use of National Forest System land without a special use authorization, in violation of 36 C.F.R. 261.10(k). 00-1417 Pet. App. 3a, 22a. Petitioners were

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[3] On September 9, 1999, the Forest Service adopted an interpretive rule to make explicit that its intent, in the context of authorizing noncommercial group uses, was that the term "public interest" refer to the three public interests identified when the regulation was adopted in 1995: "the protection of resources and improvements on National Forest System lands, the allocation of space among potential or existing uses and activities, and public health and safety concerns." 64 Fed. Reg. 48,959-48,960; see 36 C.F.R. 251.56 note to para. (A)(1)(ii)(G).

subsequently charged by information with a misdemeanor for violation of 36 C.F.R. 261.10(k). 00-1417 Pet. App. 4a. Petitioners moved for judgments of acquittal, contending that the regulations do not apply to them as individuals and, alternatively, that the regulations are unconstitutional. *Id.* at 20a-21a.

b. After a two-day bench trial, the district court denied petitioners' motions for judgment of acquittal and found each petitioner guilty as charged. 00-1417 Pet. App. 21a. The court rejected petitioners' claim that the regulations do not apply to them as individuals because "they have not been designated by the Rainbow Family to act on the group's behalf." *Id.* at 31a. The court found that petitioners "had leadership roles as spokespersons for the Rainbow Family" and were "valid objects of prosecution." *Ibid.*; see also *id.* at 23a-31a (findings of fact on each petitioner's role in the event). The court noted that the Ninth Circuit had similarly rejected petitioners' argument in *Black* v. *Arthur*, 201 F.3d 1120 (2000). 00-1417 Pet. App. 31a.

The district court also rejected petitioners' First Amendment challenges to the regulations. 00-1417 Pet. App. 32a-37a. The court relied on the Fourth Circuit's ruling in *United States* v. *Johnson*, 159 F.3d 892 (1998), that the regulations impose constitutionally valid time, place, and manner restrictions. 00-1417 Pet. App. 33a-34a.

The district court also rejected the claim that the Forest Service regulations are facially unconstitutional under *United States* v. *Linick*, 195 F.3d 538 (9th Cir. 1999). 00-1417 Pet. App. 34a-37a. The court recognized that, in *Linick*, the Ninth Circuit affirmed the dismissal of citations against two Rainbow Family members arising out of a gathering in June 1998. The district court in *Linick* had ordered that the charges be

dismissed because the regulations allowed Forest Service officers to include in a special use authorization such terms and conditions as they deemed necessary to "protect the public interest," 36 C.F.R. 251.56(a)(2)(vii) (1998), a standard that, in the court's view, granted such officers "impermissibly broad discretion in violation of the First Amendment." 00-1417 Pet. App. 34a (quoting 195 F.3d at 541). Although the Ninth Circuit affirmed the dismissal of the charges in that case, it did not affirm the ruling that the regulation itself was unconstitutional. *Id.* at 36a. The court held that the interpretive rule (see note 3, *supra*) issued by the Forest Service in September 1999 (after the gathering at issue in *Linick*) preserved the constitutionality of the regulatory scheme "because the scheme now satisfies the three-part test for time-place-manner regulation." *Id.* at 35a (quoting 195 F.3d at 543).

The district court in the instant case recognized that, as in *Linick*, the Rainbow Family gathering for which petitioners failed to obtain a special use authorization occurred before issuance of the September 1999 interpretive rule, but the court disagreed with the Ninth Circuit's conclusion that the pre-September 1999 regulation was invalid. It held that, even without the interpretive ruling, "the regulation was clearly intended to regulate conduct relative to public health and safety, not speech or expression." 00-1417 Pet. App. 36a-37a.

c. The district court imposed a sentence of three months' imprisonment and a $10 special assessment on each petitioner, and a $500 fine on petitioners Beck and Kalb. 00-1417 Pet. App. 4a; 00-1417 Pet. 3; 00-8512 Pet. 1. The court stayed the sentences pending appeal. 00-1417 Pet. App. 4a.

4. The court of appeals affirmed, holding that "the challenged regulations were properly applied to the individual [petitioners] and do not transgress constitutional requirements." 00-1417 Pet. App. 2a.

a. The court first held that the challenged regulations do not criminalize only conduct by groups and that individuals can be prosecuted for violating them. 00-1417 Pet. App. 5a-6a. The court relied on *Johnson*, *supra*, in which the Fourth Circuit held that "proof of a violation of section 261.10(k) 'requires the government to demonstrate: 1) use, 2) of National Forest land, 3) by a noncommercial group of 75 or more persons, either as participants or spectators, 4) without special use authorization.'" 00-1417 Pet. App. 5a (quoting *Johnson*, 159 F.3d at 894). The court held that the record in this case demonstrates that each of the requirements was satisfied with respect to each petitioner, that each petitioner knew of the permit requirement, that the gathering was large enough to trigger that requirement, and that an application had not been made. *Id.* at 6a. The court concluded that, "[t]o read the regulation and the penalty for its violation as inapplicable to individuals who use the National Forest System as part of a group, with deliberate disregard for the group permit requirement, would effectively eviscerate the special use authorization process." *Ibid.*

b. The court of appeals rejected petitioners' various First Amendment challenges. 00-1417 Pet. App. 6a-18a. The court held that the regulations are not unconstitutionally vague or overbroad because, unlike the ordinance in *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J.), they clearly define the conduct prohibited and do not foster uncertainty. 00-1417 Pet. App. 7a. The court next held that the requirement that a special use authorization be signed

by a member of the group is a valid time, place, and manner requirement. First, the court noted, the requirement is indisputably content-neutral and serves three valid purposes identified by the Fourth Circuit in *Johnson* and by the Forest Service—to "(1) 'protect resources and improvements on National Forest System lands,' (2) 'allocate space among potential or existing uses and activities,' and (3) 'address concerns of public health and safety.'" *Id.* at 9a (quoting *Johnson*, 159 F.3d at 895, and 60 Fed. Reg. at 45,258, 45,262). Second, the signature requirement in the regulations is tailored to serve those purposes, because that requirement "is necessary to ensure that the group will be responsible for the actions of its members as a whole, to give the authorization legal effect and to subject the group to the authorization's terms and conditions." *Id.* at 10a (quoting *United States* v. *Masel*, 54 F. Supp. 2d 903, 919 (1999) (opinion of magistrate judge), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000)). Third, the signature requirement leaves open ample alternative channels for communication because the regulations do not preclude the Rainbow Family from using state or private property or other federal land, or from gathering in groups of fewer than 75 individuals, without obtaining a special use authorization. *Ibid.*[4]

The court of appeals rejected petitioners' challenge to the validity of 36 C.F.R. 251.56, which allows the Forest

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[4] The court rejected (00-1417 Pet. App. 11a n.6) petitioners' argument that, because the Rainbow Family is loosely organized, it was legally impossible for petitioners to sign a special use authorization on behalf of the group. The court noted that the argument has been rejected by other courts and that the attendees could have designated someone to sign the authorization on behalf of the group. *Ibid.*

Service to attach terms and conditions to a special use authorization, because petitioners did not apply for (and did not receive) a special use authorization and the terms-and-conditions provision therefore was never applied to them. 00-1417 Pet. App. 11a-12a. The court held that the terms-and-conditions provision is not susceptible to facial challenge by petitioners because its relationship to expressive conduct is, "at best, incidental." *Id.* at 14a. The court reasoned that the terms-and-conditions provision is applicable to all special use authorizations, whether recreational, expressive or for any other special use, and is not applicable to use of National Forests for expressive purposes if fewer than 75 people are involved. Thus, the provision is "directed not at expression, but at the congregation of large numbers of people in the forest." *Ibid.* (quoting *Masel*, 54 F. Supp. 2d at 913).

The court of appeals further noted that, even if it were to entertain a facial challenge, it would hold that "the regulation, as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression." 00-1417 Pet. App. 15a (citing 60 Fed. Reg. at 45,262, which identifies the government's three-fold interest in protecting resources, allocating space, and addressing public health and safety concerns). The court also noted its disagreement with the Ninth Circuit's ruling in *Linick* that the terms-and-conditions provision was invalid before the September 1999 interpretive rule. *Id.* at 17a n.9.

Finally, the court of appeals rejected petitioners' argument that the regulatory scheme is unconstitutional on its face because it does not provide for immediate judicial review of overly restrictive terms and conditions. The court held that the government's

interpretation of its regulations to allow immediate judicial review of terms and conditions is reasonable and entitled to controlling weight. 00-1417 Pet. App. 18a.

ARGUMENT

Petitioners maintain that the Forest Service regulations requiring a special use authorization for noncommercial group uses of National Forest System lands cannot be applied to them as individuals and violate the First Amendment. The court of appeals correctly rejected those arguments, and they do not warrant review by this Court.

1. The court of appeals correctly rejected the claim (00-8512 Pet. 6-12) that the challenged regulations are inapplicable to individuals. Indeed, the court of appeals emphasized (00-1417 Pet. App. 5a) that "[n]ot one court considering the application of 36 C.F.R. § 261.10[(k)] has hesitated to apply that section to individual defendants,"[5] and petitioners do not cite any contrary authority.

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[5] See *United States* v. *Johnson*, 159 F.3d 892 (4th Cir. 1998) (upholding convictions of four individuals for using or occupying National Forest System lands, as part of Rainbow Family gathering of 75 or more people, without special use authorization); *United States* v. *McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999) (rejecting First Amendment challenges and denying motion to dismiss by two individual defendants charged with misdemeanor violation of 36 C.F.R. 261.10(k)); *United States* v. *Masel*, 54 F. Supp. 2d 903, 920- 921 (1999) (opinion of magistrate judge) (denying motion to dismiss by individual defendant charged with misdemeanor violation of 36 C.F.R. 261.10(k), despite defendant's claim that it was legally impossible for him to sign an application as a representative of the Rainbow Family gathering because he would be making a false statement), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

Petitioner Sedlacko is mistaken in claiming (00-8512 Pet. 6, 7, 13) that his challenge to the applicability of the regulation to individuals was "overlooked" and not addressed "directly" below. The court of appeals specifically quoted and rejected petitioner's claim that the regulation has no *actus reus* element that can be committed by an individual. 00-1417 Pet. App. 5a. The *actus reus* is the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. 261.10(k). Where a special use authorization is required because the proposed use is a group use, individuals do not violate Section 261.10(k) if they are not part of the group activity. But that is because the requirement for a special use authorization regulates the use and occupancy of National Forest System lands by individuals acting together in groups. As explained above (see p. 9, *supra*), the court of appeals adopted the Fourth Circuit's four-factor description of the proof necessary to establish a violation of 36 C.F.R. 261.10(k) (see 00-1417 Pet. App. 5a) and expressly held that "it is unnecessary that the statute specifically set forth the individual as the actor as opposed to the group * * *. The liability of an individual—or a group—occurs when the four requirements of the statute are proven." *Ibid.*

Petitioner Sedlacko's claim (00-8512 Pet. 9) that he "had no power to conform his conduct to the requirements" of the regulation also was specifically rejected by the court of appeals, which pointed out how petitioners could have avoided liability under the regulations by opting out of the gathering and that there was no indication that the Rainbow Family itself was under any imperative to gather on National Forest

System lands rather than elsewhere. 00-1417 Pet. App. 6a.[6]

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[6] The cases cited by petitioner Sedlacko regarding legal impossibilities do not support review by this Court. See 00-8512 Pet. 9 (citing *United States* v. *Dalton*, 960 F.2d 121 (10th Cir. 1992), and *United States* v. *Spingola*, 464 F.2d 909 (7th Cir. 1972)). *Dalton* has subsequently been limited by the Tenth Circuit and has been rejected by various other Circuits. See *United States* v. *Rivera*, 58 F.3d 600, 601-602 (11th Cir. 1995). In *Dalton*, the court held that a defendant could not stand convicted of possessing and transferring an unregistered firearm at a time when the government would not permit registration of the kind of firearm in the defendant's possession, because, according to the court, the prohibition against registering that type of firearm made compliance with the registration requirement impossible. By contrast, no law made it impossible for petitioner to comply with the Forest Service regulations. The only reason that petitioner claims (00-8512 Pet. 9) he could not comply with 36 C.F.R. 261.10(k) is that the Rainbow Family did not designate anyone to sign the special use authorization. As the court of appeals found, however, petitioner "could have avoided liability under the regulations by opting not to participate in the gathering on National Forest land where it was clear that a special use authorization was required and had not been granted." 00-1417 Pet. App. 6a; cf. *Rivera*, 58 F.3d at 602.

In *Spingola*, the court reversed the conviction of the secretary-treasurer of a union for failure to timely file certain annual financial reports on behalf of the union, based on the erroneous exclusion of exculpatory evidence relating to the defendant's claim of a lack of willfulness because of physical impossibility because he was unable to compel others to timely prepare accounting records that were necessary prerequisites to his filing the financial reports. 464 F.2d at 911-912. The defendant, by virtue of his office, was under a statutory obligation to timely file the reports. *Id.* at 910-911 (citing 29 U.S.C. 431(b)). By contrast, petitioners were not under any legal compulsion to participate in the Rainbow Family gathering that they knew was being held on National Forest System land without a required special use authorization.

2. The court of appeals' holding that the Forest Service regulations are not unconstitutionally vague or overbroad is correct and consistent with *City of Chicago* v. *Morales*, 527 U.S. 41 (1999). See 00-8512 Pet. 12-16. As the court of appeals explained, "[u]nlike the ordinance at issue in *Morales*, the regulations clearly define what conduct is prohibited" and there is no need for speculation. 00-1417 Pet. App. 7a. The court also correctly rejected petitioners' attempt (see 00-8512 Pet. 14) to challenge the regulations as unconstitutionally overbroad on their face, because the regulations are not aimed at expression and are not closely enough connected to expression to justify "the 'extraordinary doctrine' that permits facial challenges." 00-1417 Pet. App. 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)).[7]

3. Petitioners err in contending that the Forest Service's special-use regulations governing noncommercial group uses (including, in particular, the signature requirement) do not constitute a valid time, place, and manner restriction (00-1417 Pet. 21-24; 00-8512 Pet. 16-21), and that the regulatory scheme imposes an unlawful prior restraint (00-1417 Pet. 10-12, 21-29).

The court of appeals, consistent with the Fourth Circuit, correctly upheld the regulatory scheme as a valid time, place and manner restriction. See *United States* v. *Johnson*, 159 F.3d 892, 895-896 (1998); see also *United States* v. *McFadden*, 71 F. Supp. 2d 962, 964-965

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[7] In addition, petitioner Sedlacko's concern (0-8512 Pet. 11-12, 14-16) that members of the media or townspeople who are not part of the Rainbow Family gathering might be arrested for violating the regulation is unwarranted because such individuals who "do not arrive as part of a particular group or in connection with an organized activity" are not involved in the group use as participants or spectators. See 60 Fed. Reg. 45,270 (1995).

(W.D. Mo. 1999); *United States* v. *Masel*, 54 F. Supp. 2d 903, 914-920 (1999) (opinion of magistrate judge), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000). The regulatory scheme, including the signature requirement, is content neutral. The special-use authorization requirement does not apply to gatherings involving fewer than 75 people, and it applies to all noncommercial uses involving 75 or more people, regardless of the content or viewpoint of any speech involved.[8] The generally-applicable nature of the requirement and the fact that it is not aimed at expression or related conduct also means that it is not a presumptively invalid prior restraint. *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 760-761 (1988).

The regulations are narrowly tailored to serve legitimate governmental purposes. The Forest Service "established three significant interests in promulgating this rule: (1) Protection of forest resources and facilities; (2) promotion of public health and safety; and (3) allocation of space in the face of greater competition for the use of National Forest System lands." 60 Fed. Reg. 45,262 (1995); *id.* at 45,258. The courts below correctly found that those legitimate interests justify the regulations. See 00-1417 Pet. App. 9a-10a, 33a; see also *Johnson*, 159 F.3d at 895. The courts below also correctly held that the regulations serve those interests "in a narrowly tailored manner by providing a minimally intrusive system to notify Forest Service per-

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[8] That the signature requirement may have an incidental effect on groups that do not want to designate a representative to sign the authorization does not render the requirement content-based. See *Ward* v. *Rock Against Racism*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

sonnel of any large groups that will be using the forest so that the personnel, through advance preparation, can minimize any damage that may occur." 00-1417 Pet. App. 9a, 33a (quoting *Johnson*, 159 F.3d at 896).

Petitioners' suggestion that the government must adopt an alternative regulatory scheme that is, in petitioners' view, more narrowly drawn (00-8512 Pet. 20), is without merit. In *Ward*, this Court held that time, place, and manner restrictions need not be the "least intrusive means" of achieving the government's interests to survive constitutional attack. 491 U.S. at 789-790. Rather, the test for narrow tailoring in this context is whether the government "could reasonably have determined that its interests overall would be served less effectively without [the regulation] than with it." *Id.* at 801. The court of appeals correctly held that the Forest Service's interests would be less effectively served by a regulatory scheme that did not include the signature requirement. See 00-1417 Pet. App. 9a-10a.

The regulatory scheme leaves open ample alternative channels for communication because it does not preclude petitioners and others from using other land not subject to National Forest System regulations as the location for their gatherings of 75 or more people. It also does not preclude them from gathering on National Forest System land, without obtaining a special use authorization, if the people involved number fewer than 75.

4. Petitioners urge the Court (00-8512 Pet. 22-23) to grant review to resolve the disagreement between the court below and the Ninth Circuit in *United States* v. *Linick*, 195 F.3d 538 (1999), on whether Forest Service officers are unconstitutionally granted unbridled discretion under 36 C.F.R. 251.56(a)(2)(vii) (1998), which

allows them to impose on a special use authorization a term or condition that is needed to "protect the public interest."

a. As the court of appeals pointed out, petitioners never sought or obtained a special use authorization and, therefore, were never subject to the imposition of any term or condition under 36 C.F.R. 251.56(a)(2)(vii) (1998). Furthermore, a facial challenge to the provision is not warranted because it does not have "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *City of Lakewood*, 486 U.S. at 759. As the court of appeals concluded, the relationship between the terms-and-conditions provision and any expressive conduct "is, at best, incidental." 00-1417 Pet. App. 14a. Section 251.56 "does not target First Amendment activities" and is "not directed narrowly and specifically at expression or conduct commonly associated with expression." *Ibid.* (quoting *Masel*, 54 F. Supp. 2d at 912). The provision applies with "equal force to recreational, expressive and all other special uses of the forest." *Ibid.* Thus, under *Lakewood*, the "'terms and conditions' provision 'provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.'" *Ibid.* (court's alteration).

b. In any event, the court of appeals correctly held that Section 251.56(a)(2)(vii), "as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression." 00-1417 Pet. App. 15a. "Since 1995, the Forest Service has consistently taken the position that discretion granted to it under the regulations may only be used to further the government's threefold interest in regulating non-

commercial group use of forest land: (1) 'protect[ing] resources and improvements on National Forest System lands;' (2) 'allocat[ing] space among potential or existing uses or activities;' and (3) 'addressing concerns of public health and safety.'" *Id.* at 16a (quoting 60 Fed. Reg. at 45,262 (court's alteration)). It was entirely appropriate for the court of appeals to adopt the agency's narrowing construction of its own regulation in a manner that avoids any First Amendment issue.

Petitioners correctly note (00-8512 Pet. 22) that that ruling is inconsistent with the Ninth Circuit's decision in *Linick* that affirmed the dismissal of charges under 36 C.F.R. 251.56(a)(2)(vii) (1998) based on the conclusion that the regulation's allowance for imposition of terms and conditions "to protect the public interest" was unconstitutionally overbroad on its face. 195 F.3d at 541-542. That disagreement does not warrant review by this Court, however, because the Ninth Circuit also ruled in *Linick* that the interpretive rule issued by the Forest Service in 1999 (see note 3, *supra*) remedied the flaw the Ninth Circuit had identified. The Ninth Circuit explained that the interpretive rule limits the Forest Service's discretion to imposing terms and conditions that are designed to further "the three public interests identified by the Forest Service in promulgating the noncommercial group use rule, i.e., the need to address concerns of public health and safety, to minimize damage to National Forest System resources, and to allocate space among actual or potential uses and activities." 195 F.3d at 542 (quoting 64 Fed. Reg. 48,959 (1999)). The Ninth Circuit held that, based on that interpretation, Section 251.56(a)(2)(vii) now satisfies

the time, place, and manner standard. *Id.* at 542-543.[9] Thus, the Ninth Circuit has made clear that it would rule in accord with the court of appeals in this case in any case arising after September 1999, thereby rendering the disagreement concerning prior conduct of no ongoing significance.

5. Petitioners contend (00-1417 Pet. 13-21, 26-27) that the regulations do not provide for "prompt judicial review" as required under *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965), and therefore impose an unconstitutional prior restraint. Petitioners assert that the Court should grant review to resolve disagreement among lower courts regarding whether mere access to judicial review satisfies that requirement (00-1417 Pet. 13-16), and whether the government bears the burden of obtaining judicial review (*id.* at 17-21). Petitioners did not advance those arguments below. Instead, they argued that the judicial review provided by the regulatory scheme was inadequate because, according to their interpretation of the regulations, they had to exhaust an administrative appeals process before seeking judicial review. See C.A. Br. of Beck and Kalb

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[9] As the court of appeals correctly found, that was the interpretation intended by the Forest Service from the outset. When the Forest Service issued its 1999 interpretive rule, it emphasized that it viewed the rule simply as a restatement of its preexisting interpretation. The Forest Service explained that it was issuing the rule only "[o]ut of an abundance of caution" because, "[d]espite the clarity of the existing regulation" that limited the discretion of officers to impose terms and conditions in noncommercial group use permits to the three public interests identified by the Forest Service when it promulgated the regulation, some confusion had persisted with respect to the amount of discretion allowed. 64 Fed. Reg. at 48,959. The Forest Service emphasized that the interpretive rule was to make "explicit preexisting law." *Ibid.*

25, 30-34. The court of appeals, however, correctly adopted the government's interpretation of its own regulations, under which immediate judicial review is available to challenge the imposition of terms and conditions on a special use authorization for a noncommercial group use. 00-1417 Pet. App. 18a; see also 36 C.F.R. 251.54(h)(2) (1998) (denial of special use authorization for noncommercial group use is immediately subject to judicial review); 36 C.F.R. 251.60(a)(1)(ii) (revocation or suspension of a special use authorization for noncommercial group use is immediately subject to judicial review). The Court should decline to consider petitioners' new arguments. See, *e.g.*, *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it."). In any event, this case would not be an appropriate vehicle for resolving any disagreements among other circuits regarding the applicable legal standards, both because the court of appeals did not address those issues and because the regulations in this case are not addressed to expressive activities, as in *Freedman* and its progeny, but rather apply generally to group use of National Forest lands for any noncommercial activity.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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